No. 4202

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

WRIT OF ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF ON BEHALF OF THE UNITED STATE OF AMERICA, PLAINTIFF IN ERROR.

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NAEGELE PRINTING CO., HELENA, MONT

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IN THE

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UNITED STATES OF AMERICA,
Plaintiff in Error,

v.

HERBERT H. McGOVERN, JR.,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

To recover on his contract of War Risk Insurance issued under the War Risk Insurance Act and acts supplemental thereto, defendant in error, herein called the petitioner, instituted action thereon against the plaintiff in error, herein called the Government, by amended complaint, August 4, 1922. (Tr. p. 4).

For cause of action and grounds of recovery, petitioner alleged his permanent and total disability received while serving in the Navy of the Government dating from October 17, 1918, and resulting from tuberculosis and neuro psychosis. (Tr. pgs. 4, 5, 6.)

In answer the Government denied that petitioner was permanently and totally disabled within the meaning and intent of the War Risk Insurance Act and acts supplemental thereto and alleged that petitioner's contract of insurance lapsed December 1, 1918, by reason of non-payment of premiums thereon. (Tr. p. 11.)

The Government further alleged that petitioner reinstated his insurance in March, 1919, but allowed the same to lapse August 31, 1919, by reason of non-payment of premiums and that thereafter his insurance was not in force and effect. No replication was filed by petitioner. (Tr. pgs. 10, 11.)

Motion for trial without jury filed was granted by the court.

The cause was tried June 27, 1923, according to the provisions of the Tucker Act of March 3, 1887 (24 Stat. 506), and amendments thereto, Act of March 3, 1911, Chapter II, Section 24, paragraph 20, U. S. Comp. Stat. 1916, sec. 991. (Tr. pgs. 30, 31).

The following certificate of insurance issued by the Government under the War Risk Insurance

Act and acts supplemental thereto to the petitioner was introduced. (Tr. p. 80).

APPLICATION FOR INSURANCE.

1941583 010575

My full name is Herbert Hugh McGovern, Jr.
Home Address, Oak Grove, Oregon.
Date of birth, February 22, 1893. Age, 25.
Date of last enlistment or entry into active service, Sept. 5th, 1917.

I hereby apply for insurance in the sum of $10,000 payable as provided in the Act of Congress approved October 6, 1917, to myself during permanent total disability and from and after my death to the following persons in the following amounts:

Relationship to me	Name of Beneficiary (Given) (Middle) (Last Name)	Post Office Address	Amount of Insurance for Each Beneficiary
Father	Herbert Hugh McGovern, Sr.	Oak Grove Oregon.	$10,000

In case any beneficiary die or become disqualified after becoming entitled to an installment but before receiving all installments, the remaining installments are to be paid to such person or persons within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy.

I authorize the necessary monthly deductions from my pay, or if insufficient, from any deposit with the United States, in payment of the premiums as they become due, unless they be otherwise paid.

If this applications is for less than $4,500 insur-surance, I offer it and it is to be deemed made as of the date of signature.

If this application is for lessthan $4,500 insurance and in favor of wife, child, or widowed mother, I offer it and it is to be deemed made as of February 12, 1918.

If this application is for less than $4,500 and in favor of some person or persons other than wife, child, or widowed mother, I offer it and it is to be deemed made as of (Date of signature—February 12, 1918). Strike out whichever is not wanted.

Note.—If in the last paragraph you strike out "Date of signature," leaving "February 12, 1918." the law gives you $25 a month for life in case of permanent total disablement occurring prior to such date and the same monthly amount to your widow, child, or widowed mother for not to exceed 240 months less payments made to you while living, but nothing to anyone else in case of your death before such date, and the insurance for the designated beneficiary other than wife, child, or widowed mother is effective only if you die on or after February 12, 1918.

If you strike out "February 12, 1918," leaving

"Date of signature," a smaller insurance both against death and disability takes effect at once, but is payable in case of death to the designated beneficiary.

To whom do you wish policy sent?

(Name) Herbert H. McGovern.

(Address) Oak Grove, Oregon.

Signed at (on board) A. S. S. C. 42 the 5th day of March, 1918.

Sign here: Herbert H. McGovern, Jr., M. M., 1st Cl. USNRF.

Witnessed by: J. E. Carter

Rank: Ensign

Commanding A. S. S. C. 42

On July 9, 1923, the Government submitted a motion for specific findings of fact separately stated in the words and figures following, to wit: (Tr. p. 272)

> "Comes now the defendant, United States of America, and, deeming the following facts established by the evidence in this case, moves the Court to find said facts, and separately and specifically as hereinafter set forth:
>
> I.
>
> "That Herbert McGovern, the plaintiff herein, entered the Naval Forces of the United States September 5, 1917, and on March 5, 1918, made application for and was granted Ten Thousand Dollars ($10,000.00) term in-

surance, payable as provided in the Act of Congress approved October 6, 1917, to the insured during permanent total disability, and from and after his death to his designated beneficiary. The provisions of the War Risk Insurance Act, together with all subsequent amendments thereto, Bulletin Number 1, issued October 15, 1917, Treasury Decision Number 20, issued March 8, 1918, and all other rules and regulations promulgated pursuant to the authority conferred upon the Director of the Bureau of War Risk Insurance, constituted the terms of the plaintiff's contract of insurance with the United States of America.

II.

"That the premiums due upon the plaintiff's Ten Thousand Dollar ($10,000.00) term insurance was Six and 60-100 Dollars ($6.60) per month, and it was expressly provided in Bulletin Number 1 that insurance would lapse for non-payment of premiums thirty-one days after an unpaid premium became due.

III.

"That the monthly premiums due upon the plaintiff's insurance from March 5, 1918, to include October, 1918, were deducted from his active service pay under an authorization contained in his application for insurance. This authorization for deduction of monthly premiums expired upon the plaintiff's discharge from the Naval Forces of the United States,

on October 27, 1918, and thereafter no further duductions of premiums were made under such authorization. The plaintiff did not pay, or cause to be paid, nor was there paid by the plaintiff or any person in his behalf, the premiums due for the month of November, and by reason of such failure to pay premiums the plaintiff's insurance lapsed at the expiration of the thirty-one day grace period, on December 31, 1918.

IV.

"That on March 22, 1919, the plaintiff addressed a communication to the Bureau, stating that he was then in as good health as he was at the time of his discharge, on October 17, 1918, and enclosed a money order in the sum of Thirty-nine and 60-100 Dollars ($39.60) for the purpose of reinstating his insurance. The plaintiff's application for reinstatement was granted, and the Thirty-nine and 60-100 ($39.60) Dollars was applied in payment of premiums to include July, 1919. The plaintiff did not pay, or cause to be paid, any premiums due upon his insurance for months subsequent to July, 1919, nor were there paid any premiums due upon his insurance for months subsequent to July, 1919, and by reason of such failure to continue to pay premiums, his insurance again lapsed for nonpayment of premiums, at the expiration of the thirty-one day grace period, on August 31, 1919, and became null and void after that date.

V.

"That the records of the Bureau of Medicine and Surgery of the Navy Department show that the plaintiff was admitted to the Naval Hospital, New London, Conn., June 26, 1918, and was found to be suffering with tuberculosis. He was later transferred to Fort Lyons, Colorado, and from there to the Modern Woodmen's Sanitorium, Colorado Springs, Colorado, where he was discharged from the Naval Service of the United States.

VI.

"That on April 26, 1919, the plaintiff filed claim with the Bureau of War Risk Insurance for compensation (not insurance) because of physical disability which he alleged resulted from salt water getting in the storage batteries and engine room gas. Reports of physical examinations made by physicians designated by the Bureau of War Risk Insurance, now known as the United States Veterans Bureau, on September 1, 1919, January 1, 1920, February 25, 1920, May 3, 1920, December 9, 1920, December 17, 1920, February 7, 1921, May 19, 1921, September 20, 1921, and December 19, 1922, showed that the plaintiff's sputum was negative for tubercle bacilli, and that his tubercular process "had been arrested or quiescent since his release from Naval Service.

VII.

"That the plaintiff did not allege that he was suffering with any nervous or mental disease or disorder at the time of his discharge from the Naval Forces of the United States, nor was any evidence of any nervous or mental disease or disorder discovered in the course of his physical examinations prior to May 3, 1920. The report of physical examinations dated May 3, 1920, signed by F. B. Nather, Surgeon, Spokane, Washington, states that plaintiff complained that his nerves were all shot to pieces, that he was weak and could hardly walk. His physical examination at that time showed that his head, neck and abdomen were in normal condition. Attached to F. B .Nather's report of examination dated May 3, 1920, there was a report of neuro psychiatric examination made by George E. Price, M. D., a neuro psychiatrist of Spokane, Washington, which stated that the plaintiff was suffering with hysteria. Dr. Price recommended that work would be the best form of treatment for this particular case, but as this would undoubtedly meet with strenuous opposition, he suggested that plaintiff be sent to neurological center for treatment.

VIII.

"That after examination of the plaintiff on November 12, 1920, Dr. W. S. Little of Kalispell, Montana, reported that he could find no evidence of physical or mental disorder, that

the plaintiff was able to resume his former occupation, and that he could see no reason for plaintiff getting any compensation whatever.

IX.

"That on March 12, 1921, Loy J. Molumby, Great Falls, Montana, was appointed as guardian of plaintiff, as an incompetent person, by the Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, but the said Loy J. Molumby was discharged as such guardian on August 11, 1921, upon advice of Dr. Michaels, a neuro psychiatrist of the United States Veterans Hospital, No. 68, Minneapolis, Minnesota, who reported that the plaintiff was not incompetent.

"While there is some evidence which indicates that the plaintiff has no real mental or nervous trouble and that he is merely pretending to have such disability for the purpose of securing compensation and insurance from the United States Veterans Bureau, the plaintiff has been given the benefit of the doubt by the Bureau, and his malady diagnosed variously as constitution psychopathic inferiority, without psychosis, but with emotional instability, psychoneurosis, pensionitis, and compensation hysteria.

X.

"That the experts called by the defendant to testify in this case stated that in their opin-

ion the plaintiff was probably suffering with hysteria superinduced by anxiety to obtain compensation and insurance, and that this malady was not of a permanent nature, such as would warrant a reasonable expectation that it would totally disable the plaintiff during the remainder of his life.

XI.

"That under the Medical Rating Schedule approved by the Director of the United States Veterans Bureau, July 15, 1921, hysteria and kindred nervous diseases are classified as temporary disabilities, and as not warranting a finding of permanent total disability for the purpose of paying insurance benefits.

XII.

"That upon the evidence secured by physical examination and other evidence presented by or in behalf of the plaintiff, the Director of the Veterans Bureau found that the plaintiff was not shown to be permanently and totally disabled on or before August 31, 1919, the date upon which his insurance lapsed for nonpayment of premiums.

XIII.

"That there is evidence in the plaintiff's compensation and insurance file in the United States Veterans Bureau, upon which the Director of the said Bureau could reasonably find that the plaintiff was not permanently

and totally disabled on or before August 31, 1919.

XIV.

"That at the trial of this action, the plaintiff did not attempt to offer any evidence that the finding of the Director of the United States Veterans Bureau was unreasonable and not founded on sufficient facts to reasonably warrant such a finding.

XV.

"That the plaintiff did, however, offer evidence of his physical condition which was not shown to have been previously submitted to the United States Veterans Bureau, including the testimony of himself, taken by deposition, of Loy J. Molumby, F. L. Carey of Great Falls, Montana, Rev. William P. Callaghan, Herbert H. McGovern, Sr., Lola Veller, Dr. Dora Walker, W. S. Bentley, Dr. Thomas Walker and Dr. Vidal, all of which was allowed to be introduced in evidence over the objection of the defendant for the reason that such evidence had not previously been submitted to the United States Veterans Bureau, and, as it had never been acted on by the Director of the said Bureau, could not constitute the basis of a disagreement whereon suit might be brought under the provisions of Section 13 of the War Risk Insurance Act (40 Stat. 555), and for the further reason that all of such evidence concerned the plaintiff's physical

condition subsequent to August 31, 1919, the date upon which his insurance lapsed.

XVI.

"Neither from the evidence submitted to the Bureau or from any testimony submitted at the trial of this case has it been shown that the plaintiff, on or before the 31st day of August, 1919, or at any time, or at all, was suffering from tuberculosis or nervous or mental disorder, or any disease whatsoever, so as to disable plaintiff permanently and totally from continuously carrying on any gainful occupation, but that the testimony does show, that if plaintiff ever suffered from tuberculosis, the same was at all times above mentioned arrested, and in a quiescent and not an active state, and any disorder that plaintiff may be suffering with at present has been diagnosed by all the doctors testifying in this case, as hysteria, which is curable, and which condition is not shown to have developed to a total degree of disability until long after the 31st day of August, 1919."

On July 18, 1923, the petitioned submitted a motion for findings of fact and conclusions of law in the words and figures following, to-wit: (Tr. p. 279, 280)

"Comes now the plaintiff in the above entitled action and respectfully requests the Court to make the following findings of fact and conclusions of law in this action:

1.

"That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

"That on or about the 19th day of June, 1917, the plaintiff enlisted in the Naval Forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first class Machinist in its Navy and was, during all of said time employed in active service during the war with Germany and its allies.

3.

"That on or about the 5th day of March, 1918, the plaintiff made application for insurance under the provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand Dollars; that he was duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums upon said insurance and that said insurance was in force and effect down to and including the 31st day of October, 1918.

4.

"That during plaintiff's period of service with the defendant during the War with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him unable to follow any substantially gainful occupation, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably certain to continue throughout the life time of the plaintiff; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

"That the plaintiff made application to the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veterans' Bureau and the Bureau of War Risk Insurance and the Directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

"Conclusions of Law.

1st: That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and Fifty Cents ($57.50) per month from and after the 17th day of October, 1918.

2nd: That the plaintiff is entitled to Judgment against the defendant herein."

On November 26, 1923, the court filed its decision in favor of the petitioner (Tr. p. 289) and thereafter on the first day of December, 1923, made findings of fact and conclusions of law by approving and adopting the findings of fact and conclusions of law submitted by the plaintiff on July 18, 1923, except for changes incorporated in paragraph 4 thereof, said findings and conclusions so adopted and approved by the court being in the words and figures following,to-wit: (Tr. p. 294)

"Comes now the plaintiff in the above entitled action and respectfully requests the Court to make the following findings of fact and conclusions of law in this action.

1.

"That the plaintiff is now and has been for a period of more than five years prior to the institution of the action, a resident of the State of Montana, in the District of Montana.

2.

"That on or about the 19th day of June, 1917, the plaintiff enlisted in the Naval Forces of the United States of America and that down to and including the 17th day of October, 1918, he served the Government of the United States of America as a first class Machinist in its Navy and was, during all of said time employed in active service during the War with Germany and its allies.

3.

"That on or about the 5th day of March, 1918, the plaintiff made application for insurance under the provisions of Article Four of the War Risk Insurance Act of Congress, in the sum of Ten Thousand Dollars; that he was duly issued a certificate of his compliance with said War Risk Insurance Act and that thereafter, during the term of his service in the United States Navy there was deducted from his pay, for said services by the United States Government, monthly premiums upon said insurance and that said Insurance was in force and effect down to and including the 31st day of October, 1918.

4.

"That during plaintiff's period of service with the defendant during the War with Germany and its allies, and while acting in line of duty of such service, the plaintiff contracted

a disability and suffered an injury which have ever since the 17th day of October, 1918, continuously rendered and still render him practically unable to follow any substantially gainful occupation to reasonable reward, and the disabilities resulting from said disease and from said injury are of such a nature that they are reasonably likely to continue for a long, incomputable and indefinite time; that by reason of said disabilities plaintiff is now and has been ever since the 17th day of October, 1918, totally and permanently disabled.

5.

"That the plaintiff made application to the Veterans' Bureau and the Director thereof and through the Bureau of War Risk Insurance and the Director thereof, for the benefits of the War Risk Insurance Act for total permanent disability and the Veterans' Bureau and the Bureau of War Risk Insurance and the Directors thereof refused to pay the claimant the amount provided for total permanent disability and disputed the claim and right of the plaintiff to said benefits and have refused to grant the plaintiff said benefits under said Insurance Act.

6.

"Conclusions of Law.

1st: That the defendant is indebted to the plaintiff in the sum of Fifty-seven Dollars and

Fifty Cents ($57.50) per month from and after the 17th day of October, 1918.

2nd: That the plaintiff is entitled to judgment against the defendant herein."

On December 17, 1923, the court rendered judgment against the Government in the sum of $2,530 (Tr. p. 16).

ASSIGNMENTS OF ERROR.

The following assignments of error are those intended to be urged in this proceeding. (Tr. pgs. 18-23, inc.):

1. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning of the War Risk Insurance Act and acts supplemental thereto.

2. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning and intent of the War Risk Insurance Acts and acts supplemental thereto before August 31, 1919.

3. The Court erred in finding that the plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, did not lapse on August 31, 1919.

4. The Court erred in failing to find that the plaintiff's contract of insurance under the War

Risk Insurance Act and acts supplemental thereto, lapsed on August 31, 1919.

5. The Court erred in finding that plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, matured on August 31, 1919.

6. The court erred in admitting in evidence, over objection of defendant, all exhibits of plaintiff concerning matters arising after August 31, 1919.

7. The Court erred in admitting testimony on behalf of the plaintiff, and over the objection of the defendant, concerning matters arising after August 31, 1919.

8. The Court erred in not restricting testimony on behalf of plaintiff to matters and events on and before August 31, 1919, and such that had been submitted by or on behalf of the plaintiff to the Bureau of War Risk Insurance or to the United States Veterans' Bureau.

9. The Court erred in admitting in evidence the exhibits of plaintiff for a purpose other than to show a basis of disagreement between plaintiff and defendant.

10. The Court erred in admitting, on behalf of plaintiff and over the objection of defendant, tes-

timony on matters never submitted to the War Risk Insurance Bureau of the United States Veterans' Bureau, and which were not and could not be the basis of disagreement.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau, holding plaintiff not permanently and totally disabled is final, and that such determination was not an abuse of the powers granted to the said Bureaus under the said acts.

14. The Court erred in finding that there is no reasonable probability that the plaintiff will recover from any disability or ailment he may be suffering from.

15. The Court erred in finding that an ailment or disease, even though curable, constitutes permanent and total disability of the one afflicted therewith within the meaning and intent of the War Risk Insurance Acts and acts supplemental

thereto, when the one so afflicted has been dispossessed thereby of any substantial earning power, and there is reasonable probability that such disability will continue for an indefinite time.

16. The Court erred in failing to find that plaintiff, if afflicted at all, was afflicted with an ailment or disease that is curable.

18. The Court erred in finding that in the event of disagreement under the provisions of the War Risk Insurance Act and acts supplemental thereto, the whole matter of the insured's disability is at large and open to contention, and the Court is not restricted to a review of the Bureau's judgment.

20. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental therto, as adopted by the Bureau of War Risk Insurance and the United States Veterans' Bureau were in excess of authority.

21. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Acts and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the Director thereof and the United States Veterans Bureau and the Director thereof, were repugnant to and in contravention of the meaning and intent of said acts.

22. The Court erred in failing to find that the War Risk Insurance Act and acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said acts are not governed by the rules and principles of law governing other kinds of insurance.

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

24. The Court erred in approving and adopting and making findings of fact and conclusions of law, in accordance with such submitted by plaintiff, even with the modifications made by the Court to paragraph 4 thereof.

25. The Court erred in not rendering judgment herein in favor of defendant and against plaintiff, for the reason that the plaintiff's contract of insurance had lapsed for non-payment of premiums and had terminated before commencement of suit, and for the further reason that plaintiff was never permanently and totally disabled while his contract of insurance was in full force and effect.

26. The Court erred in rendering judgment herein in favor of plaintiff and against defendant.

27. The Court erred in entering herein a judgment in favor of the plaintiff and against the defendant.

For Purposes of Orderly Discussion and Because Kindred in Nature and Involving Similar Points These Assignments are Herewith Grouped and Entitled in the Following Sequence.

A. War Risk Insurance Act and note supplemental thereto and the contracts of insurance issued thereunder are not governed by the rules and principles of law governing other kinds of insurance. (Assignment of Error 22) (Tr. p. 22).

B. Regulations defining permanent total disability adopted by the Bureau were not in excess of authority. (Assignments of Error 12, 20 and 21) (Tr. pgs. 20, 22).

C. The Court erred in finding that the petitioner was totally and permanently disabled within the meaning of the War Risk Insurance Act and in failing to find that petitioner's insurance lapsed August 31, 1919. (Assignments of Error 1, 2, 3, 4, 5, 14, 15 and 16) (Tr. pgs. 18, 19, 21).

D. Admission of testimony concerning matters arising after August 31, 1919, was error (Assignments of Error 6, 7, 8 and 11) (Tr. pgs. 19, 20).

E. The Court erred in failing to adopt the findings of fact submitted by the Government and by aaproving and adopting the findings of fact in accordance with such submission by the petitioner. (Assignments of Error 23, 24, 25, 26 and 27). (Tr. pgs. 22, 23).

F. Admission of evidence never submitted to the Bureau was error. (Assignments of Error 9, 10 and 11) (Tr. pgs. 19, 20).

G. The Court erred in reversing the finding of this Bureau to the effect that petitioner did not become permanently and totally disabled on or before August 31, 1919 (Assignments of Error 12 and 18) (Tr. pgs. 20, 21).

ARGUMENT AND BRIEF.

War Risk Insurance Act and Acts Supplemental Thereto and the Contracts of Insurance Issued Thereunder are Not Governed by the Rules and Principles of Law Governing Other Kinds of Insurance.

Assignments of Error—Group A

22. The Court erred in failing to find that the War Risk Insurance Act and acts supplemental thereto provide for a special statutory kind of insurance and that the contracts of insurance issued under said acts are not governed by the rules and principles of law governing other kinds of insurance (Tr. p. 22).

The contract of insurance in this case came into being by Federal Statute (40 Stat. 398-411) known as the War Risk Insurance Act and specifically Article IV thereof (40 Stat. 409-411), and is, therefore, not an ordinary contract of insurance such

as is issued by insurance companies, where the parties concerned are free to exercise their natural rights to contract, but is a special statutory kind of insurance, and its terms and conditions are governed by the act creating it.

Cassarello v. United States (Third Circuit), 297 Fed. 396-398, Affirming 271 Fed. 486.

Watson v. Tarpley, 59 U. S. 517-521, 15 L. ed. 509-510.

Lewis' Sutherland on Statutory Construction, Vol. 2, p. 1314.

This contract is, therefore, a federal contract of insurance and no rights are conferred thereunder save those provided by the War Risk Insurance Act and amendments thereto, the regulations promulgated thereunder, the terms and conditions of the contract of insurance as published by the Director under the statutory authority given him by the War Risk Insurance Act and the application for insurance, all of which constitute the petitioner's contract of insurance in this case.

Helmholz v. Horst, et al, 294 Fed. 417.

Gilman et al v. United States, 294 Fed. 422.

In the case of Helmholz v. Horst, supra, the court stated:

"In order to insure the accomplishment of the beneficial purposes of the War Risk Insurance Act, it was further provided therein that the terms and provisions of such contracts of insurance should be subject in all respects to the provisions of the act or any amendment thereto, and also subject to all regulations thereunder, now in force or hereafter adopted, all of which, together with the application for insurance and the terms and conditions published under authority of the act, should constitute the contract. All of these provisions and conditions were written into the certificate issued to Alfred R. Marshall, and became and are a part of the contract. For this reason subsequent amendments of the War Risk Insurance Act and subsequent regulations affecting this contract, which is still in force, do not impair the obligations of an existing contract, but are in direct conformity with its terms, and in furtherance of its purpose and intent."

The War Risk Insurance Act among other things provides:

"Section 1. (As amended August 9, 1921). The powers and duties pertaining to the office of the Director of the Bureau of War Risk Insurance now in the Treasury Department are hereby transferred to the director, subject to the general direction of the President, and the said office of the Director of the Bureau of War Risk Insurance is hereby abolished. * * *" (42 Stat. 147)

"Section 2. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes and shall decide all questions arising under this Act except as otherwise provided herein." (42 Stat. 148.)

"Section 13. (As amended May 20, 1918) That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the

right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards. * * * *" (40 Stat. 555).

"Section 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Departmnt or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided." (40 Stat. 409)

"Section 402. That the director, subject to the general direction of the Secretary of the Treasury, *shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.* * * * *" (40 Stat. 615).

Pursuant to the powers conferred in the sections above quoted, on October 15, 1917, the Di-

rector of the Bureau of War Risk Insurance by the direction of the Secretary of the Treasury determined upon and published Bulletin No. 1, containing the full and exact terms and conditions of the contract of insurance to be made under and by virtue of the War Risk Insurance Act. Bulletin No. 1 among other things provides:

> "Premiums shall be paid monthly on or before the last day of each calendar month and will, unless the insured otherwise elects in writing, be deducted from any pay due him/her from the United States or deposit by him/her with the United States, and, if so to be deducted, a premium when due will be treated as paid, whether or not such deduction is in fact made, if upon the due date the United States owe him/her on account of pay or deposit an amount sufficient to provide the premium, provided that the premium may be paid within 31 days after the expiration of the month, during which period of grace the insurance shall remain in full force. If any premium be not paid, either in cash or by deduction as herein provided, when due or within the days of grace, this insurance shall immediately terminate, but may be reinstated within six months upon compliance with the terms and conditions specified in the regulations of the bureau. * * * *
>
> "*These terms and conditions are subject in all respect to the provisions of such Act and*

of any amendments thereto and of all regulations thereunder now in force or hereafter adopted.''

On March 9, 1918, the Director promulgated a regulation known as Treasury Decision No. 20, War Risk, defining the term ''total and permanent disability'' in the following language:

''By virtue of the authority conferred in Section 13 of the War Risk Insurance Act the following regulation is issued relative to the definition of the term ''total disability'' and the determination as to when total disability shall be deemed permanent:

''Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

'' 'Total Disability' shall be deemed to be 'permanent' whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments of insurance

shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue." (Tr. p. 271)

Rules and regulations prescribed by a department of the Government pursuant to statutory authority "become a mass of that body of public records of which the Courts take judicial notice."

Caha v. United States, 152 U. S. 211-222, 38 L. ed. 415-419.

Regulations Defining Permanent Total Disability Adopted by the Bureau Were Not in Excess of Authority.

Assignments of Error—Group B.

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau, holding plaintiff not permanently and totally disabled, is final, and that such determination was not an abuse of the powers granted to the said Bureaus under said acts.

20. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the United

States Veterans' Bureau were in excess of authority.

21. The Court erred in finding that the regulations defining permanent and total disability under the War Risk Insurance Act and acts supplemental thereto, as adopted by the Bureau of War Risk Insurance and the Director thereof and the United States Veterans Bureau and the Director thereof, were repugnant to and in contravention of the meaning and intent of said acts. (Tr. pgs. 20, 22)

We have heretofore set forth the provisions of section 13 of the Act of October 6, 1917, (brief, p. 25), conferring upon the Director full power and authority to promulgate rules and regulations to govern the Bureau of War Risk Insurance, and we have further shown the promulgation, on March 9, 1918, of regulation No. 11, known as Treasury Decision No. 20, War Risk, defining total disability.

This regulation has the full force and effect of law unless inconsistent with the provisions of the War Risk Insurance Act.

Congress, by section 400 (40 Stat. 409) provides that the United States "shall grant insurance against the death or total permanent disability" of any person in the active military or naval service of the United States upon application therefor.

What did Congress mean when it used the ex-

pression "total permanent disability" as applied to War Risk Insurance and was the interpretation put upon these words by said Treasury Decision No. 20 inconsistent with the intention of Congress?

The primary rule of statutory construction is to give effect to the intention of the legislature.

> Rodgers v. U. S., 185 U. S. 83-86, 46 L. ed. 816-18.

We are looking at the state of things then (at the time of its passage) existing, and in the light then appearing seek for the purposes and objects of Congress, in using the language it did. And we are to give such construction to that language, if possible, as will carry out the Congressional intentions.

In construing the War Risk Insurance Act we have the right to consider the report of the Committee of the House wherein the legislation originated, as a guide to its true construction.

> McLean v. United States, 226 U. S. 374-379, 57 L. ed. 260-263,

> Northern Pacific Railway Co. v. Washington, 222 U. S. 370-380, 56 L. ed. 236-240.

In a decision of the Supreme Court rendered January 3, 1921, Justice Pitney said:

> "By repeated decisions of this court it has

come to be well established that the debates in Congress expressive of the views and motives of the individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of a "law-making body. Aldridge v. Williams, 3 How. 9, 24; United States v. Union Pacific R. R. Co., 91 U. S. 72-79; United States v. Freight Assosociation, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Penn. R. R. Co. v. International Coal Co., 230 U. S. 184, 198-199; United States v. Coco Cola Co., 241 U. S. 265-281; United States v. St. Paul, M. & M. Ry. Co., 284 U. S. 310, 318. Duplex Printing Company v. Emil J. Deering, etc., 254 U. S. 443, 65 L. ed. 176."

On Aug. 10, 1917, Mr. Alexander, of the Committee on Interstate and Foreign Commerce, introduced in the House of Representatives the original War Risk Insurance Bill, No. 5723. The original bill is to be found in Congressional Record, 65th Congress, Vol. 55, Part VII, pages 6750-6752.

Section 400 provided that "the United States * * * shall grant insurance against death or total disability."

It seems clear that this total disability is the same total disability which Congress had in mind in Article III (Compensation), directly referred to in Article IV, Section 400).

It will be noted that section 302 of Article III, providing for compensation for total disability and partial disability, in the original bill (Cong. Rec. p. 6751) did not contain these words:

> "Provided, however, That for the loss of both feet or both hands or both eyes, or for becoming totally blind or helplessly and permanently bedridden from causes occuring in the line of duty in the service of the United States, the rate of compensation shall be $100 per month; Provided further, That no allowance shall be made for nurse or attendent."

These words constitute statutory total disability, were taken from Pension provisions, and were added to said section 302 as the result of a sharp controversy on the floor of the House during the passage of the bill. (Cong. Rec. 7078-7080).

At the same time the plan of compensation in said original bill, based on a percentage of the soldier's pay, was likewise, after sharp controversy, amended to a flat rate for officers and soldiers alike. (Cong. Rec., 7077-7078.)

Thus, the plan of the original bill was upset on the floor of the House and it apparently escaped attention that under section 302, as amended, a man totally disabled was entitled to but $30.00 per month, while a man statutorily totally disabled was entitled to receive $100.00 per month.

Obviously, the rate of compensation for disability, whether statutory total or total, should be the same and this condition was not fully corrected until the enactment of section 11 of the Amendment of December 24, 1919 (41 Stat. 373), amending section 302 by subparagraph (3) to read as follows:

> "(3) If and while the disability is rated as total and permanent, the rate of compensation shall be $100 per month; Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand, the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability; Provided further, That for double, total, permanent disability the rate of compensation shall be $200 per month.

It will be noted that this amendment provided—

> "(10) That section 302 of the War Risk Insurance Act as amended shall be deemed to be in effect as of April 6, 1917; * * * *

The point we are attempting to make here is that Total Disability is at least such a degree of disability as would be equal to statutory total disability, as above defined.

This original bill was referred to the Committee on Interstate and Foreign Commerce on August 10, 1917. Hearings were commenced on August 11th and on August 30th the Committee reported the bill with various changes (House Report 130, Parts I, II and III, Congressional Record, 65th Congress, Vol. 55 Part VII, pages 6708-6713). Mr. Rayburn, of the Committee, had charge of the bill and submitted the report of the majority. He says (House Report 130, Part I, page 6708):

> "This insurance is to be sold to the soldiers at normal rates of actual cost which he would pay if he were not a soldier. In this way he can not only secure insurance from the Government but can secure it at a proper rate. Existing insurance companies charge prohibitive rates for war risks.
>
> "While they recognize $8 a thousand as a normal rate for a man 21 years old, they add an additional $50 a thousand for a war risk, making the lowest rate for a soldier by private insurance $58 a thousand. In the next place it is term insurance, which ends with the period unless renewed, but may be renewed at the option of the soldier until the end of the war, when it may be converted into some

other form of insurance. This is provided for because the soldier may be considerably older at the end of the war, his health may be impaired, and if so it would be difficult and expensive for him to secure insurance from a private company. We feel that it is right for the Government to make restitution, as far as possible, by giving him the same benefits as to insurance which he would have enjoyed if he had never served his country in the war. An advantage to the soldiers and their families carried by this bill is that the benefits to be paid are not to be paid in a lump sum, to be squandered or lost in unfortunate investment, but will be paid in installments so as to afford the greatest benefits.

"Another valuable feature of the bill is that if during the first 120 days after enlistment the soldier should fail to take insurance, and die, he will be considered as insured and the benefits of such insurance will go to his family.

"Your committee thinks this bill wise and beneficent in all its features, and though a radical departure in some respects, thinks it will prove a great blessing to our soldiers and their families and be very satisfactory to the country.

"The first, second, and third features provide for the maintenance of the families of the soldiers during service and for compensa-

tion in case of death, and it is believed this is effected much more satisfactorily in this bill than in the existing pension system and will not be so expensive in the long run. The elements of certainty and security afford an incentive to the soldier to go forward confident of protection by the Government to themselves and their families and go far to mitigate the anguish of the families themselves during the unhappy separation from the soldiers."

He says further (House Report 130, Part III, page 6709):

"Any young man physically fit to enter the Army can protect himself and his family present or future, by insurance against death or total disability, but if he enters the Army by this very patriotic service he is deprived for all practical purposes of this right, inasmuch as the additional rates ranging from $37.50 to $100 per thousand, that private companies charge, are absolutely prohibitive. Purely as a matter of justice the Government should make this loss good by compensation in kind; that is, by issuing its own insurance. This, however, is but one of many justifications for article 4 of this bill.

"Article 3 and 4 are to be dealt with together. While the Government can fairly give only a minimum of compensation based upon general conditions throughout the land, it must recognize that men ought not to be content

with this minimum; that they ought, with true American foresight and self-reliance, to procure additional protection for themselves and their families in case they become disabled or die through injuries received in the service.

* * * * * * * * * * *

"We shall preserve American ideals and sustain the self-respect of our fighting youth if we offer them in place of either present or future gratuities a real opportunity to purchase for themselves the protection that they may deem essential for their families. But this protection must be real; it must cover death or disability at any time, not merely within five years after the war. The insurance must mature, if the insured so desires, when he reaches a certain age, as well as by death or total disability. Speculation in the insurance must not be permitted; it must be unassignable and free from the claims of creditors, both of the issured and of the beneficiary. It must not be payable to any and every one, but only to a limited class of relatives. The bill contains all of these provisions.

"Clearly the Government should bear the cust due to the increased mortality that the war will produce. Furthermore, the Government should administer this isurance for its soldiers and sailors as a governmental function, without charge to the insured for the mere administration. The Government will

have no expenses for commissions, medical examinations, taxation, advertising, and investment. The premium rates, therefore, to be charged for the insurance should be the net rates without any addition or loading such as is made by private insurance companies to cover expenses. They should be based upon the ordinary mortality experience in peace times. These are the provisions of the bill."

Mr. Rayburn, in explaining the bill (Cong. Rec. p. 6760) made use of the following language:

"It was my hope that we should close up this bureau when the war was over, but it is absolutely impossible, as I find after an investigation of the question, because we will have men killed; their monthly installments will go along. And we will have some partially disabled, and not enough, though, to collect their insurance then—not amounting to total disability—and we would not feel like closing up the bureau and turning these men out where they can not get insurance in the future."

Mr. Rayburn further said, in explaining the bill (Cong. Rec. p. 6759)—

"Mr. Key of Ohio. Under the provisions of your bill I notice that where a soldier receives total disability, say the loss of both eyes or both arms or both legs, that you give him $40 a month and $20 nurse hire. Then, for partial disabilities, the loss of one arm, one

leg, one eye, the adjudication of that is to be left to the discretion of the Treasury Department. Is that right?

"Mr. Rayburn. Where is it left now? In your law you provide that it shall be left to the Commissioner of Pensions.

"Mr. Key of Ohio. You provide a special rate for total disability, but not for a partial disability.

"Mr. Rayburn. No.

"Mr. Key of Ohio. You cut down the rate from the existing law for disability from $100 to $40, and if there is a disposition to cut down the total disability to $40 from the law, as the Bureau of Pensions has it, what will it do with the partial disabilities—give them a mere pittance?

"Mr. Rayburn. No; we have provided that it shall be settled on a percentage, and let me say that the $40 applies only to the single man.

"Mr. Key of Ohio. The total disability is cut down two-thirds, and if you cut the special rate for total disability down two-thirds, what are you going to do with the other?

"Mr. Rayburn. If his injury is slight, it ought to be cut down.

"Mr. Key of Ohio. For the loss of one arm

or one leg or one eye, what would you call that? Fifty per cent?

"Mr. Rayburn. Perhaps 50 per cent; but that is a matter of administration."

The original bill, the bill as amended and as passed by the House, did not contain either in Article III or IV the expression—total permanent disability.

On September 15, 1917, the bill reached the Senate and was referred to the Committee on Finance.

In a general outline or explanation of the bill by Senator Williams, who had charge of the bill on the floor of the Senate, the following language was used (Cong. Rec. Vol. 55, Part VIII, Oct. 3, 1917, p. 7690):

"The reason that guided us was this: The man is summoned to the colors by his country. The drafted man goes because he must go. The Government creates the war, not the soldier. The war hazard, therefore, is the creation of the Government. Of course, the volunteer ought not to be put upon any lower ground than the drafted man. Now, we thought the Government ought to bear that part of the insurance risk which the Government created, and we thought we ought to make the soldier bear that part which in ordinary peace times he would have had to bear if he had taken out insurance. We therefore charge him just that net premium, which is

$8 in the case I have mentioned. Then the Government bears the war risk and it also bears the overhead charge. It is fair that the Government having deprived a man of his insurability, should put him at least in statu quo ante bellum with regard to insurability, and that is what this bill does.

"When all these people, summoned here to be consulted and to advise in the drafting of this bill, gathered around they expressed themselves as highly delighted with the bill, except that the insurance men kicked about the insurance part of it. They did not want the Government to 'go into the insurance business' as they expressed it. But the Government is not going into the insurance business in that or any general sense. It is not going into the general insurance business at all. In the first place, it is confining its activities simply to the soldiers and the sailors in the service. In the second place, it confines the beneficiaries to the soldiers' and sailors' dependent families.

* * * * * * * * *

"Everything that has been urged against this bill in a demagogic way falls to the ground. There is no just criticism of it from that standpoint. We have done equal and exact justice as well as we know how. We have made these policies non-assignable with the purpose and with the undoubted result of pre-

venting speculation on the part of people who might want to take out policies on lives of soldiers or sailors for speculative purposes. We have made them exempt from the claims of the creditors either of the insured or of the beneficiary, somewhat like a widow's and orphan's policy in the New York Life Insurance Co. under the laws of New York.

"First, then, we have limited the beneficiaries; second, we have limited the amount; third, we have limited the insured to the service; fourth, we have made the policy nonassignable; and fifth, we have exempted it from debts and execution. To these limited extents we have gone into the insurance business, but no farther; and, as far as we have gone, we have simply done that which every government from the beginning of the earth ought to have been doing."

Senator Williams again said (Cong. Rec. Vol 55, Part VIII, p. 7692):

"Here is a man who has taken out a policy. The man is partially disabled; he comes back and his insurability has been totally lost because of the injury received in the war, and he can not get any insurance from private companies. * * * *Of course, this form of policy in this bill never matures unless the man dies or is totally disabled.*"

Section 302 (1), Article III, as the bill passed the House, reads as follows:

> "If and while the disability is total *so as to make it impracticable for the insured person to pursue any gainful occupation,* the monthly compensation shall be in the following amounts * * *."

But these words underlined were stricken out in the Senate. (Cong. Rec. Part. VIII, p. 7697). Immediately thereafter (pages 7698) the Insurance article was amended by the Senate wherever necessary by inserting the word "permanent," in connection with total disability and these amendments were agreed to in conference by the House.

It is evident that Congress intended War Risk Insurance should mature only upon death or actual total disability and then only in the event that said total disability was permanent.

Therefore, it would seem that petitioner can not successfully contend that said Treasury Decision No. 20 requires more than the act itself requires, that he must in fact be actually totally disabled—that it is impossible for him to follow continuously any substantially gainful occupation—and that his actual total disability is founded upon conditions (facts) which render it reasonably certain that such actual total disability will continue throughout his life.

There is nowhere in the original bill, in any amendment thereto or in the explanation of the bill by the respective chairmen of House or Senate

Committees having the bill in charge during its passage, any suggestion that War Risk Insurance could become payable on anything less than actual total permanent disability or death.

In determining the meaning of the phrase "permanent total disability," as used in the War Risk Insurance Act, attention is respectfully invited to the following sections of the War Risk Insurance Act:

> "Sec. 302 (3) * * * Provided, however, That the loss of both feet, or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total, permanent disability."
>
> "Sec. 302 (4) If and while the disability is rated as partial and permanent, the monthly compensation shall be a percentage of the compensation that would be payable for his total and permanent disability equal to the degree of the reduction in earning capacity resulting from the disability, but no compensation shall be payable for a reduction in earning capacity rated at less than 10 per centum. A schedule of ratings of reductions in earning capacity from specific injuries or combinations of injuries of a permanent nature shall be adopted and applied by the bureau. Ratings may be as high as 100 per centum. The ratings shall be

based, as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations and not upon the impairment in earning capacity in each individual case, so that there shall be no reduction in the rate of compensation for individual success in overcoming the handicap of a permanent injury. The bureau in adopting the schedule of ratings of reduction in earning capacity shall consider the impairment in ability to secure employment which results from such injuries. The bureau shall from time to time readjust this schedule of ratings in accordance with actual experience."

Under the authority conferred by the Act, the Director has promulgated Regulation No. 11 known as Treasury Decision No. 20, War Risk, supra, defining permanent and total disability. This regulation has the force of law.

U. S. v. Birdsall, 233 U. S. 231, 34 Sup. Ct. 512, 85 L. ed. 930.

U. S. v. Grimaud, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. ed. 563.

The Court has judicial knowledge of such regulations.

Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513, 38 L. ed. 415.

It will be noted that, except as provided in Sec. 302 (3), Congress has not defined what conditions shall constitute permanent and total disability, but has left the determination of that question for the Director, and has conferred express authority upon the Director to prepare and apply ratings of permanent disability which may be as high as 100 percent.

The practical construction given to a doubtful statute by the department or officers whose duty is to carry it into execution is entitled to great weight and will not be disregarded or overturned except for cogent reasons, and unless it is clear that such construction is erroneous.

Pennoyer v. McConnaughy, 140 U. S. 1-25, 35 L. ed. 363-370.

United States v. Ala. Great Southern R. R. Co., 142 U. S. 615-621, 35 L. ed. 1134-6.

United States v. Union Pac. Ry. Co., 148 U. S. 562, 37 L. ed. 560-572.

United States v. Sweet, 189 U. S. 471-474, 47 L. ed. 907, 908.

The construction given to the act of October 6, 1917, by the Bureau of War Risk Insurance and the officers of the Bureau charged with the duty of administering the act, continued as it has been practically from the date of enactment, should

have impressive force, but when that construction is concurred in by a second department of the Government that force becomes compelling, and a construction so firmly established ought not to be reversed except for the most imperative of reasons, which certainly do not here exist.

United States v. Finnell, 185 U. S. 236-244, 46 L. ed. 890-893, is in point. The court in that case stated:

> "It thus appears that the Government has for many years construed the statute of 1867 as meaning what we have said it may fairly be interpreted to mean, and has settled and closed the account of clerks upon the basis of such construction. If the construction thus acted upon by accounting officers for so many years should be overthrown, we apprehend that much confusion might arise. Of course, if the departmental construction of the statute in question were obviously or clearly wrong, it would be the duty of the court to so adjudge: United States v. Graham, 110 U. S. 219; Wisconsin C. R.'d Co. v. United States, 164 U. S. 190. But if there simply be doubt as to the soundness of that construction—and that is the utmost that can be asserted by the Government—the action during many years of the department charged with the execution of the statute should be respected, and not overruled except for cogent reasons. Edward v. Darby, 12 Wheat, 208, 210; United States v. Philbrick,

> 120 U. S. 52, 59; United States v. Johnson, 124 U. S. 236, 253; United States v. Alabama G. C. R'd Co., 142 U. S. 615, 621. Congress can enact such legislation as may be necessary to change the existing practice, if it deems that course conducive to the public interests."

The Comptroller General of the United States in his decision of July 25, 1921, and again in his decision of August 9, 1922, held that War Risk Insurance may not be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the Bureau.

In his decision of July 25, 1921 (Comp. Gen. Vol. 1, p. 31), he says:

> "The insurance provided for by section 400 of the act of October 6, 1917 (40 Stat. 409), is payable only in case of death or 'total permanent disability,' and may not lawfully be paid for any disabled condition which is not in fact permanently total according to the medical opinion and award of the bureau. As in the case of compensation the director is authorized and empowered by law to decide when a condition of permanent total disability exists. The same legal restriction upon his power to make general regulation which applies to compensation applies with equal force to insurance and I can not approve a regulation which undertakes to establish conclusively by lapse of time a condition of perma-

nent disability which can be determined to exist only by competent medical opinion based upon the facts of any given case. * * *

"But the existence of a condition of total disability of any applicant for compensation or insurance and the temporary or permanent character of the disability is a matter which I think can not properly and lawfully be determined by general regulation. However, as hereinbefore stated, the duty and responsibility of determining these conditions rests upon the director."

Again, in his decision of August 9, 1922 (Comp. Gen. Vol. II, p. 99), he says:

"It is the duty of the director to determine whether or not this man did in fact become permanently totally disabled at any time prior to March, 1920. If he did so become disabled there was no lapse of insurance for failure to pay premiums falling due after that time, and insurance payments and refunds should be adjusted accordingly. If he did not in fact so become disabled the facts stated would indicate that the insurance lapsed in March, 1920, for failure to pay premiums when due and was not thereafter in force, unless the action of the director in collecting premiums from September, 1921, may be taken as equivalent to reinstatement of the unpaid remainder of the insurance. Whether that action may be so taken is not a question of which decision

has been specifically requested, and may depend upon matters of fact not disclosed by the submission. Responsibility for the determination in this case of the condition of permanent total disability and the date of its commencement is upon the Director of the Veterans' Bureau, not upon the Comptroller General.

"In the second case as in the first it is for the director to determine whether the insured did in fact become permanently totally disabled and if so on what date the permanent total disability commenced. * * *"

"I may repeat here that it is the duty of the Director of the Veterans' Bureau to determine as a matter of fact whether this insured had become permanently and totally disabled prior to his death, and if so at what time that condition commenced. If the director finds that the condition in fact existed and that it commenced on a date prior to the time for which the last premium was paid, there was no lapse of the insurance and no erroneous payment, and further payments should be made accordingly."

On the character of the insurance granted by the United States the Comptroller of the Treasury, now succeeded by said Comptroller General, in his opinion of July 5, 1919, said:

"It has been suggested that in granting the insurance and collecting the premiums therefor the United States assumed a contractual

obligation to pay in any event and in all cases the full amount, 240 installments, of the insurance, but I can not accept this view of the matter. That the premiums charged were inadequate to cover the risks assumed by the United States is clearly shown by the provisions of section 403 (40 Stat. 410) of the Act. And the purpose of the Government in assuming the risks at inadequate premium rates was to furnish a measure of protection and support to dependent relatives of persons in the military and naval service. This insurance feature of the law is not an out-and-out contract of insurance on an ordinary business basis, neither is it a pension, but it partakes of the nature of both.

"In granting this insurance it was clearly within the power of the United States to say to what persons and under what circumstances the insurance would be paid. The statute designates persons to whom and the conditions under which payments are to be made, and in view of the nature of the risks assumed, and the inadequacy of the premiums charged; in other words, considering the pension as well as the insurance feature, it is but reasonable to assume that payments were not intended to be made except to the persons and under the conditions mentioned in the act. It must be held, therefore, that the obligation of the United States is only such as it assumed under the express provisions of the statute."

In this last decision, said Comptroller held that even accrued installments of insurance unpaid at the death of a beneficiary did not pass to said beneficiary's estate, and thus made legislation necessary by Congress to "change existing practice," to make insurance payable which was not theretofore payable. (See Sec. 19, 41 Stat. 376-377).

Now what is the situation regarding Regulation No. 11 (Treasury Decision No. 20, brief p. 27) defining permanent and total disability?

This regulation was promulgated March 9, 1918, and has controlled the adjudication of every case passed upon by the Bureau from that date to this.

Meanwhile, *"The War Risk Insurance Act"* has been many times amended by Congress, notably the amendment of June 25, 1918 (40 Stat. 609-616), the amendment of December 24, 1919 (41 Stat. 371-376), the amendment of August 9, 1921 (42 Stat. 147-157), and the amendment of March 4, 1923 (42 Stat. 1521-1527).

In none of the amendments has Congress seen fit to "change existing practice" on the question now under consideration, but in several of these amendments has amended Article IV.

It is insisted that General Order No. 20 either as an express term of the petitioner's contract of insurance or is a regulation lawfully issued by the Director of this Bureau is not contrary to the intent and meaning of the War Risk Insurance Act

and is not in excess of the authority conferred upon the Director by the provisions of said Act.

The Court Erred in Finding That the Petitioner Was Totally and Permanently Disabled Within the Meaning of the War Risk Insurance Act by Failing to Find That Petitioner's Insurance Lapsed August 31, 1919.

Assignments of Error—Group C.

(Tr. pgs. 18, 19, 21)

1. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning of the War Risk Insurance Act and acts supplemental thereto.

2. The Court erred in finding that plaintiff was permanently and totally disabled within the meaning and intent of the War Risk Insurance Act and acts supplemental thereto before August 31, 1919.

3. The Court erred in finding that the plaintiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, did not lapse on August 31, 1919.

4. The Court erred in failing to find that the plaintiff's contract of insurance under the War Risk Insurance Act and acts supplemental thereto, lapsed on August 31, 1919.

5. The Court erred in finding that plain-

tiff's contract of insurance, under the War Risk Insurance Act and acts supplemental thereto, matured on August 31, 1919.

14. The Court erred in finding that there is no reasonable probability that the plaintiff will recover from any disability or ailment he may be suffering from.

15. The Court erred in finding that an ailment or disease, even though curable, constitutes permanent and total disability of the one afflicted therewith within the meaning and intent of the War Risk Insurance Acts and acts supplemental thereto, when the one so afflicted has been dispossessed thereby of any substantial earning power, and there is reasonable probability that such disability will continue for an indefinite time.

16. The Court erred in failing to find that plaintiff, if afflicted at all, was afflicted with an ailment or disease that is curable.

On March 15, 1918, the petitioner made application for and was granted $10,000 insurance by the application set forth. It is insisted that the provisions of the War Risk Insurance Act, Bulletin No. 1, and Treasury Decision No. 20, together with the Application for Insurance above mentioned constituted his contract of insurance with the Bureau.

See Helmholz v. Horst, et al, 294 Fed. 417.

Gilman v. U. S., 294 Fed. 422.

By the express terms of the contract of insurance as contained in Treasury Decision No. 20 above set forth (Tr. p. 271), the petitioner was to be deemed permanently and totally disabled only upon a showing that he suffered an impairment of mind or body which rendered it impossible for him to continuously follow any substantially gainful occupation, and that such impairment of mind or body was founded upon conditions which rendered it *reasonably certain that it would so continue throughout the life of the petitioner.*

The petitioner has not sought any modification of his contract in equity but has brought suit at law upon the terms of his contract. He must recover, therefore, if he recovers at all, upon the terms of the contract in the manner and form which such contract exists.

In his finding of fact under date of December 1, 1923, the court found that "the disabilities resulting from said disease and said injury are of such a nature that they are reasonably likely to continue for a *long, incomputable, indefinite time.* (Tr. p. 296).

In his opinion dated November 26, 1923, the Court stated:

> "From this it appears in the main and with little dissent that subsequent to the discharge

> plaintiff has given little evidence of tuberculosis, but has been and is subject to chronic bronchitis, fainting spells, extreme nervousness, hysteria, psychosis maniac depressive, is of constitutional psycopathic inferiority superimposed emotional irritability and paranoid trend, is unable to make social adjustment, is disabled to care for self, to follow his vocation of mining engineer or any other vocational training, *and reasonably likely to be for an indefinite period.*" (Tr. p. 291).

The Government respectfully insists that the finding that the petitioner was suffering with "disabilities reasonably likely to continue for an indefinite period" or disabilities which are "reasonably likely to continue for a long, incomputable, indefinite time" is not equivalent to a total disability which is founded upon conditions which render it *reasonably certain that it will so continue throughout the lifetime of the person suffering from it,* and that under the specific findings made by the court, the petitioner cannot be deemed to be permanently and totally disabled within the meaning and intent of Treasury Decision No. 20, which is an express term of his contract of insurance.

As the court found facts which did not warrant a finding that the petitioner became permanently and totally disabled and within the meaning of the War Risk Insurance Act, it is obvious that his insurance did not mature by reason of such disabil-

ity or disabilities, and that his insurance lapsed on August 31, 1919, for non-payment of premiums and was not in force and effect after that date.

While the court purports to find that petitioner became permanently and totally disabled from the date of discharge as a matter of fact, such finding is not really a finding of fact, but is a conclusion of law. The point we are trying to make is this—the nature and extent of the disabilities by reason of which petitioner was suffering at time of discharge, are questions of fact. *Whether or not such disabilities separately or taken together permanently and totally disabled the petitioner within the meaning of the War Risk Insurance Act, is a question of law.* It will be noted that the court has not expressly found the dates between which the petitioner was suffering with the injuries or diseases found by the court, or the dates between which petitioner was totally disabled by reason of such injuries or disabilities. It was not denied that the Government had rated petitioner totally disabled from date of discharge by reason of tuberculosis, but it was vigorously asserted by the Government that the petitioner gave no evidence of any mental or nervous trouble until long after August 31, 1919, and that certainly he was not totally disabled by reason of mental or nervous injury or disease on or before August 31, 1919, and not permanently and totally disabled by reason of tuber-

culosis or any other injury or disease at that time.

Concerning the petitioner's tubercular condition the Court in its opinion of November 26, 1923, states that "subsequent to discharge plaintiff has given little evidence of tuberculosis." (Tr. p. 291).

It is insisted that disabilities resulting from injuries or diseases which arise at different times and endure for different periods of time cannot be tacked together to make a permanent total disability from the date which the first of such disabilities arose. Permanent disability excludes that which is merely temporary, and the word "permanent" in connection with the word "disability" will be held to exclude the consideration of a disability which is merely temporary.

> Joyce on Insurance, 2nd Ed. Vol. V, Sec. 3035, Hollobough v. Peoples Insurance Co., 138 Pa., 595, 22 Atl. 29.

Permanent total disability can only be found when the disabled person is totally disabled by reason of some injury or disease which is of such a nature and extent as will make it reasonably certain that a total disability from such injury or disease will continue throughout the remainder of the disabled person's lifetime. In other words, admitting that the petitioner was totally disabled from the date of discharge until July 1, 1920, by reason of tuberculosis or chronic bronchitis, and

that he was totally and permanently disabled from January 1, 1920, by reason of some mental or nervous disease which had not totally disabled him prior thereto, it is insisted that a permanent and total disability could not be found from the date of discharge but could only be found to have existed from May 1, 1920. When it is remembered that a permanent and total disability matures War Risk Insurance whereas a total temporary disability does not, and will not prevent lapse of same, the importance of this question is at once apparent.

In the present case the court has contented itself with finding a total disability from the date of discharge by reason of several diseases or injuries and a finding that one or more of the disabilities resulting from said disease or said injury are of such a nature that petitioner is likely to be totally disabled for a long, incomputable, indefinite time. Upon such findings the court has concluded that petitioner has a permanent total disability from the date upon which such combination of injuries and diseases has totally disabled the petitioner. This is a conclusion of law and is contrary to the express terms of petitioner's contract of insurance and the lawful rules and regulations of the United States Veterans' Bureau.

Again it is believed that judicial notice will be taken of the fact that chronic bronchitis, fainting spells, extreme nervousness, and hysteria are, in

common knowledge, temporary rather than permanent diseases, and that while any or all of such diseases may produce a total disability, such total disability will in all probability be cured or at least diminished in the course of time. Concerning the finding that petitioner is subject to "psychosis maniac, depressive, is of constitutional psycopathic inferiority with superimposed emotional irritability and paranoid trend," attention is called to the fact that the petitioner's constitutional psychopathic inferiority did not prevent him from becoming a mining engineer, and that despite the finding of "superimposed mental irritability and paranoid trend," he was able to testify in his own behalf by deposition and the court itself found that such testimony indicates "average intelligence, at least." (Tr. p. 292).

Thus it appears that the court has found that petitioner was suffering only with diseases which as a matter of common knowledge are essentially temporary in nature except psychosis, maniac, and constitutional psycopathic inferiority. The court, however, found that petitioner's constitutional condition permitted completion of engineering course and did not affect his testimony.

It is submitted that upon the facts related by the court the petitioner cannot as a matter of ordinary human knowledge be deemed to be permanently and totally disabled either within the mean-

ing and intent of permanent and total disability as specified by the War Risk Insurance Act, or within the meaning of that term in its ordinary acceptation.

While the Government insists that the petitioner cannot be deemed to have been or to be permanently and totally disabled at any time from the diseases or injuries found by the court, attention is respectfully invited to the fact that unless petitioner in fact becomes permanently and totally disabled on or before August 31, 1919, his insurance lapsed on that date and was not thereafter in force and effect. Hence, petitioner's physical or mental condition after August 31, 1919, is immaterial and irrelevant unless and until he is first shown to have been permanently and totally disabled on or before August 31, 1919.

Admission of Testimony Concerning Matters Arising After August 31, 1919, *Was Error*
Assignments of Error—Group D.

(Tr. pgs. 19, 20).

6. The Court erred in admitting in evidence, over objection of defendant, all exhibits of plaintiff concerning matters arising after August 31, 1919.

7. The Court erred in admitting testimony on behalf of the plaintiff, and over the objection of the defendant, concerning matters arising after August 31, 1919.

8. The Court erred in not restricting testimony on behalf of plaintiff to matters and events on and before August 31, 1919, and such that had been submitted by or on behalf of the plaintiff to the Bureau of War Risk Insurance or to the United States Veteran's Bureau.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Dola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. E. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

Over the objection of the Government petitioner was allowed to introduce the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F. Walker, Dr. C. E. K. Vidal, and Dr. W. S. Bentley. The Government objected to the admission of this evidence for the reasons that none (see record) of these witnesses were acquainted with petitioner until long after August 31, 1919, and that as it had not been admitted or shown that his insurance was in force at any time after that date, his physical or mental condition thereafter was immaterial and irrelevant. Presumably, the testimony of these witnesses was admitted "de bene," in expectation that petitioner would later

introduce evidence showing a permanent total disability existing on or before August 31, 1919. (Tr. pgs. 32, 37, 39, 48, 49, 56, 59, 63, 74, 184, 190, 231).

The petitioner, however, introduced no further evidence except the testimony of himself, his father, Herbert H. McGovern, Sr., and extracts from the records of the U. S. Veterans' Bureau. The admission of the testimony of the petitioner's father, Herbert H. McGovern, Sr., was objected to by the Government for the reason that such testimony was indefinite, uncertain, and did not specify the dates upon which the witness noted the petitioner to be in the condition stated, but merely testified that he was suffering with certain disabilities without specifying whether such disabilities existed before or after August 31, 1919. (Tr. p. 49). Clearly, such testimony was insufficient to warrant a finding that the petitioner became permanently and totally disabled on or before August 31, 1919.

The records of the Government so introduced concerned the petitioner's physical and mental condition both before and after August 31, 1919. None of these reports indicated that the petitioner was suffering with any nervous or mental trouble or psychoneurosis until long after August 31, 1919, but showed that he was suffering from tuberculosis only at all times prior to that date.

The records of the Government so introduced

were not proof of the fact as to what petitioner's physical condition was, but merely proof of what the records of this Bureau showed his condition to be.

Evanston v. Gunn, 99 U. S. 66, and McInerney v. U. S., 143 Fed. 144, are cited as authority for the proposition that such records were admissible in evidence in proof of the facts stated therein. It is submitted, however, that the records in these cases concerned matters of fact within the knowledge of the persons making such records, and were also matters of common knowledge. There could be but little or no doubt as to the truth of the facts stated therein. In the present case, the records involved statements based upon the uncertainties of medical opinions and diagnoses concerning which there were, of necessity, much conjecture and differences of opinion.

Apart from the records of this Bureau the petitioner has utterly failed to submit any evidence as to his disability, if any, on or before August 31, 1919, and by reason of such failure has not rendered any of the other testimony introduced in his case material or relevant thereto. Hence, there was no evidence before the court upon which a finding could be made that petitioner was permanently and totally disabled on or before August 31, 1919.

While the testimony of the witnesses in this case was alleged to be admitted "de bene" and under

the promises that the same would receive no consideration unless found competent, (i. e. permanent and total disability on or before August 31, 1919) it is submitted that the court has, of necessity, used this testimony in reaching its decision in this case, and that apart from such evidence, there was nothing upon which the court might pass.

Assuming, however, that the records of this Bureau were properly admitted in evidence and were proof of the facts therein recited, such evidence shows that the petitioner was suffering only with a tubercular or respiratory disability until long after August 31, 1919, and that the petitioner never claimed or asserted that he was suffering with any other injury or disease until long after that date. Under such aspect of the case the petitioner could only be found to be suffering with tuberculosis, and the court specifically found that "subsequent to discharge plaintiff has given little evidence of tuberculosis." (Tr. p. 291).

Hence, whether the records of this Bureau were admissible or inadmissible, the court could only properly have found upon all the evidence presented in the case that the petitioner was not suffering with any injury or disease which permanently and totally disabled him on or before August 31, 1919, and that his insurance lapsed and became null and void on that date.

The Court Erred in Failing to Adopt the Findings of Fact Submitted by the Government and by Approving and Adopting the Findings of Fact in Accordance With Such Submission by the Petitioner.

Assignments of Error—Group E

(Tr. pgs. 22, 23).

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

24. The Court erred in approving and adopting and making findings of fact and conclusions of law, in accordance with such submitted by plaintiff, even with the modifications made by the Court to paragraph 4 thereof.

25. The Court erred in not rendering judgment herein in favor of defendant and against plaintiff, for the reason that the plaintiff's contract of insurance had lapsed for non-payment of premiums and had terminated before commencement of suit, and for the further reason that plaintiff was never permanently and totally disabled while his contract of insurance was in full force and effect.

26. The Court erred in rendering judgment herein in favor of plaintiff and against defendant.

27. The Court erred in entering herein a

judgment in favor of the plaintiff and against the defendant.

Section 7 of the Tucker Act (24 Stat. 506, U. S. Comp. St. 1901, p. 755) provides:

> "That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon."

In its request for findings of fact, the Government asked that the court find that Bulletin No. 1, issued October 15, 1917, Treasury Decision No. 20, issued March 8, 1918, and all other rules and regulations promulgated pursuant to authority conferred upon the Director of the Bureau of War Risk Insurance, constituted the terms of the petitioner's contract of insurance with the United States of America. (Tr. pgs. 272, 273). The court failed to so find, and in lieu of the requirements of permanent total disability as defined by Treasury Decision No. 20, found that a disability existing for a long, incomputable, indefinite time constituted permanent and total disability. (Tr. p. 293).

The Government further requested the court to find that petitioner had not shown any evidence of hysteria or other nervous or mental disease which totally disabled him until long after August

31, 1919. (Tr. p. 279). The court ignored this request and found the existence of several disabilities subsequent to discharge without specifying the dates between which such disabilities existed.

The findings requested would have clearly shown whether the court considered Treasury Decision No. 20 as an express term of the petitioner's contract of insurance or a valid regulation of the U. S. Veterans' Bureau, and whether or not the court purported to find a permanent and total disability from the date of discharge resulting from mental or nervous diseases solely, or upon a continuation of total disability caused by the successive diseases which petitioner suffered since discharge. As the court failed to make these specific findings requested by the Government, the facts and reasons upon which the court found judgment against the United States cannot be determined.

The case of Hymans v. U. S., 139 Fed. 997, contains the following excerpt:

> "In U. S. v. Swift the United States Circuit Court of Appeals in this circuit have lately sent down an opinion (139 Fed. 225), Judge Putnam speaking for the court, in which that court comments upon the Tucker act and the proceedings in causes under that act. In discussing the opinion which the court

must file under that act, Judge Putnam says: 'Under the statute that opinion is not to be regarded as the usual opinion of the trial judge, but must be accepted as a part of the record.' It seems clear that the purpose of the opinion is to enable the public and the appellate court to find upon the record a formal statement of the findings of the circuit court, both upon questions of law and fact and the reasons for such findings."

Admission of Evidence Never Submitted to the Bureau Was Error.

Assignments of Error—Group F.

(Tr. pgs. 19, 20).

9. The Court erred in admitting in evidence the exhibits of plaintiff for a purpose other than to show a basis of disagreement between plaintiff and defendant.

10. The Court erred in admitting, on behalf of plaintiff and over the objection of defendant, testimony on matters never submitted to the War Risk Insurance Bureau or the United States Veterans' Bureau, and which were not and could not be the basis of disagreement.

11. The Court erred in admitting the testimony of F. L. Carey, William P. Callahan, Loy J. Molumby, Lola Beller, Dr. Dora Walker, Dr. J. C. Michael, Dr. Thomas F.

Walker, Dr. C. E. K. Vidal, Herbert H. McGovern, Sr., W. S. Bentley and Herbert H. McGovern, Jr., on behalf of plaintiff and over the objection of defendant.

It is elementary that the Government cannot be sued without its consent. Congress has an absolute discretion to specify the cases and contingencies in which the liability of the Government is submitted to the courts for judicial determination and courts may not go beyond the letter of such consent.

Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, L. ed. 108.

Cassarello v. U. S., 265 Fed. 326.

Section 13 of the War Risk Insurance Act (40 Stat. 555) in part provides:

"That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context

otherwise requires, shall or may be made by the director, subject to general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards; Provided, however, That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: And provided further, That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three, and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

It is clear that the Director of the Bureau of War Risk Insurance, now the United States Vet-

erans' Bureau, is charged with the duty of determining by questions involved in administering the provisions of the War Risk Insurance Act. Congress has not consented to be sued on claims arising under the War Risk Insurance Act in every event, but only in the event of a disagreement between the Bureau and a beneficiary. It is submitted that there can be no disagreement between the Bureau and the plaintiff as to evidence never submitted to the Bureau and that such evidence cannot constitute the basis of a suit of an action under the authorization contained in Section 13 above quoted. This may be demonstrated by the following example.

Suppose a person claims to be permanently and totally disabled from tuberculosis, and after such claim has been denied by this Bureau, brings an action under Section 13 of the War Risk Insurance Act, and attempts to prove permanent and total disability by reason of loss of both legs. To hold that proof of loss of both legs is admissible in evidence would, in fact, deprive the Director of his duty of deciding all questions arising under the Act and authority expressly conferred upon him by Sections 2 and 13, supra, of the said War Risk Insurance Act. In the present case none of the evidence as to the nature and extent of the petitioner's disability was shown to have been submitted to the Bureau prior to the trial of this ac-

tion and the Government objected to the admission of all such evidence on the specific ground that such evidence not having been previously submitted to the Bureau could not constitute the basis of a disagreement which would authorize the commencement of an action against the Government under the provisions of Section 13. (Tr. pgs. 32, 37, 39, 48, 49, 56, 59, 63, 64, 74, 184, 190, 231.)

The court below on November 26, 1923, in the case of Mitchell v. United States, also a case involving War Risk Insurance, recognizes this jurisdictional question in the following language:

> "Presentation of claim and disagreement is a prerequisite to maintenance of this suit.
>
> "This condition was not met, this suit can not be maintained, and it is dismissed.
>
> "A claim for compensation and disagreement thereon, is not the like in respect to insurance, the first will not serve for the last nor as a justification of suit.
>
> " 'Men must turn square corners when they deal with the Government' and assume to hale it into court. Bourquin."
>
> See also Covey v. U. S., 263 Fed. 768-777.

As none of the testimony of any of the petitioner's witnesses was shown to have been previously submitted either in form or substance to the Bu-

reau for consideration, a claim based upon such evidence was never allowed or disallowed by the Director of the U. S. Veterans' Bureau and such evidence could not constitute the basis of a disagreement.

It is urged that under the express terms of the statute, questions involving the War Risk Insurance Act in the first instance, at least, are for the determination of the Director of the U. S. Veterans' Bureau and that the court below ousted the Director of his statutory duty by receiving evidence not previously submitted to the Bureau. The jurisdiction of the court was conditioned upon a disagreement between the petitioner and the Bureau, and a showing of such disagreement was necessary to establish the authority of the court to entertain petitioner's action.

The Court Erred in Reversing the Finding of This Bureau to the Effect That Petitioner Did Not Become Permanently and Totally Disabled on or Before August 31, 1919.

Assignments of Error—Group G

(Tr. pgs. 20, 21)

12. The Court erred in not finding that under the terms of the War Risk Insurance Act and acts supplemental thereto, the determination of the Bureau of War Risk Insurance and the United States Veterans' Bureau,

holding plaintiff not permanently and totally disabled, is final, and that such determination was not an abuse of the powers granted to the said Bureau under said acts.

18. The Court erred in finding that in the event of disagreement under the provisions of the War Risk Insurance Act and acts supplemental thereto, the whole matter of the insured's disability is at large and open to contention, and the Court is not restricted to a review of the Bureau's judgment.

23. The Court erred in failing to find and adopt the findings of fact submitted by the defendant.

Section 1 of the War Risk Insurance Act, as amended August 9, 1921, in part provides:

"The powers and duties pertaining to the office of the Director of the Bureau of War Risk Insurance now in the Treasury Department are hereby transferred to the director, subject to the general direction of the President, and the said office of the Director of the Bureau of War Risk Insurance is hereby abolished."

Sec. 2. The Director, subject to the general direction of the President, shall administer, execute and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions

of this Act which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act except as otherwise provided herein."

"Sec. 3. The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made part of the Veterans' Bureau."

"Sec. 13 provides in part:

"That the Director, subject to the general direction of the Secretary of the Treasury, shall administer, execute and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in Section Five." (Relating to suits in Admiralty under Marine and Seaman's Insurance.'

The sections above quoted clearly show that Congress intended that the Director should determine all questions relative to the administration of the War Risk Insurance Act. Congress did not intend to abrogate the power thus given, in Sections 2 and 13, to the Director, by enacting that part of Sec. 13 which reads:

"that in the event of disagreement as to a

> claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the district court of the United States in and for the district in which such beneficiaries or any one of them resides."

This provision of Section 13 above quoted, while giving a dissatisfied claimant a right to bring suit for insurance, contemplated that the Director of the Bureau should be charged with the duty of determining all questions involved in administering the provisions of the War Risk Insurance Act. It seems clear that Congress did not intend to clog the United States courts with War Risk Insurance claimants, or that the United States courts should reverse the findings of the Director on a mere difference of opinion, but only in such cases as it could be shown that the action taken by the Director was contrary to the provisions of the Act, or that there was no evidence to warrant his action and that his findings were unreasonable. Hence, it is believed that the finding of the Director should be sustained by the courts, even though there is some evidence which might warrant a different finding, and that the Director's action should not be reversed by the courts unless it is clearly shown that such action was not based on any evidence, and is clearly unreasonable.

The propositions stated above are sustained by the following decisions:

> "Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination, and courts may not go beyond the letter of such consent."

Schillinger v. U. S., 155 U. S. 163, 15 Sup. Ct. 85, 39 L. ed. 108.

> "It is plain that Congress intended to confer upon the administrative officer full and exclusive authority to decide all questions arising under the Act (War Risk Insurance Act) in so far as they involved the exercise of executive duties and required the determination of disputed facts, and to the extent indicated, to make such decisions final and not reviewable by the courts."

Silberschein v. U. S., 280 Fed. 917.

(This case is one brought under the War Risk Insurance Act on a claim for compensation, but it is believed that what is stated above is applicable to claims for insurance as well as claims for compensation.)

See also:

U. S. v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. ed. 610.

Degge v. Hitchcock, 229 U. S. 162, 33 Sup. Ct. 639, 57 L. ed. 1135.

U. S. v. Laughlin, 249 U. S. 440, 39 Sup. Ct. 340, 63 L. ed. 696.

U. S. v. Babcock, 250 U. S. 328, 39 Sup. Ct. 464, 63 L. ed. 1011.

"Where particular authority is confided in a public officer, to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision upon these facts in the absence of any controlling provisions is absolutely conclusive."
Allen v. Blunt, Fed. Case No. 216.

It is submitted, therefore, that the finding made by the Director of the United States Veterans' Bureau to the effect that the plaintiff was not permanently and totally disabled at the time his insurance lapsed under the authority conferred upon him by the statute is entitled to great weight and ought not to be reversed unless it is clearly shown that such finding was unreasonable or at least contrary to the weight of the evidence. The court below did not find that the Bureau's decision was unreasonable or against the weight of the evidence, but simply found that the evidence before the court (not the evidence submitted by petitioner to the Bureau) showed petitioner to be permanntly and totally disabled. Such finding is clearly con-

trary to the express intent and meaning of the Statute.

For the reasons stated we earnestly contend that the petitioner did not become permanently and totally disabled within the meaning and intent of the War Risk Insurance Act on or before August 31, 1919; that his insurance lapsed on that date for non-payment of premiums, and was not thereafter in force and effect; and that judgment of the court below was erroneous and should be reversed.

Respectfully submitted,

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